SURVEY OF RECENT DECISIONS

OF

THE HONORABLE PAUL J. KILBURG

U.S. Bankruptcy Court
Northern District of Iowa

April 23, 1993 -- August 23, 1993

Prepared by

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In re James and Julie Eckenrod — 11 U.S.C. § 109(e)
Bky. 93-60178LW
Chapter 13, 8/19/93

Creditor's Motion to Dismiss asserts that Debtors do not qualify for Chapter 13 because their unsecured debts total more than $100,000. The parties dispute whether Creditor is undersecured to the extent Debtors claim certain collateral equipment exempt. Also, they disagree in their valuations of the equipment. HELD: In determining eligibility for Chapter 13, debt is treated as unsecured to the extent it is undersecured. Debtors' right to claim the exemptions is in dispute. The value of the collateral equipment claimed exempt should not be excluded in calculating the amount Creditor is undersecured. Considering the Code's preference for reorganization over liquidation, disputes as to value of collateral for determination of Ch. 13 eligibility should be resolved in Debtors' favor. Court finds Debtors eligible under § 109(e).

See In re Paul and Teresa Bishop in section VI. below.

IV. EFFECT OF BANKRUPTCY RELIEF; INJUNCTION & STAY, 2361-2490

C. Relief from Stay, 2421-2460

In re Zweibahmer, Karl J. — Fed. R. Bankr. P. 1007(c); 11 U.S.C. § 362(a)(1); § 362(d)(1); Iowa Code § 562.6
Bky. 93-60650LW
Chapter 11, 5/20/93

ISSUE 1. Rule 1007(c) Deadlines. U.S. Trustee's motion to show cause complains of pro se debtor's failure to file schedules. HELD: Debtor has until a date certain to file schedules or the case will automatically be dismissed. ISSUE 2. Relief from Stay. Creditor seeks relief from automatic stay to enforce its FED judgment against Debtor. HELD: The automatic stay applies to the continuation of judicial action, including appellate proceedings in state court. The state court's appellate ruling in the FED action one day after bankruptcy petition filed is void as it applies to Debtor. The issue remains

whether the real estate contract forfeiture proceeding against the landlord-vendee also terminated the Debtor's leasehold interest. The only interest Debtor held was as a tenant under the 10-year farm lease with the IGWT Trust. Debtor's residual interest in a lease is property protected by the automatic stay. Under Iowa law, a farm tenant must receive notice of termination of tenancy prior to September 1 even though the landlord-vendee's interest has been cut off by forfeiture. Debtor has the right to retain the property for at least the current crop year. The leasehold interest is valuable to the debtor's bankruptcy estate. Creditor's motion for relief from stay is denied.

In re Bockes Brothers Farms, Inc. (Hager Contract) — 11 U.S.C. § 362(a)
Bky. 93-60881KW — Iowa Code § 656.4
Chapter 11, 7/26/93

Creditor seeks relief from automatic stay to proceed with eviction proceedings in state court following forfeiture of real estate contract. Several months prior to filing bankruptcy, Debtor had attempted to cure contract default outside the 30-day period allowed by Iowa Code § 656.4. HELD: After forfeiture of real estate contract, Debtor retains no property interest against which the automatic stay operates. The bankruptcy court cannot resuscitate previously extinguished contract rights. Debtor retains a simple possessory interest. Creditor is entitled to relief from the stay to proceed with eviction in state court. Debtor may raise any equitable defenses in the state court action.

In re Terry L. Gearhart — 11 U.S.C. § 362
Bky. 93-10494LC — § 105
Chapter 7, 8/18/93 — Fed. R. Bankr. P. 7065

Debtor filed Motion to Reinstate Automatic Stay. Previous order by the Court lifted the automatic stay to allow Creditor, Debtor's ex-wife, to enforce the dissolution decree. HELD: The Court does not have authority under the Bankruptcy Code to reimpose the automatic stay once it has been lifted. Injunctive relief under § 105, if requested, requires strict compliance with Rule 7065 and F.R.C.P. 65.

D. Enforcement of Injunction or Stay, 2461-2480

In re Jeffrey Roche — 11 U.S.C. § 362(a)(6)
Bky. 93-10546LC — § 362(h)
Chapter 7, 6/10/93

Debtor seeks monetary damages for the Creditor's violation of the automatic stay. Debtor received one collection notice after he filed his petition. Creditor asserts it did not get notice of the bankruptcy prior to mailing the collection notice. HELD: Damages may be awarded for willful violations of the stay. A collection effort is a willful violation if it is done with knowledge of the bankruptcy. Even assuming Creditor had knowledge of the commencement of the case, Debtor sustained no actual damages. Proof of damages fails where the only damages claimed result from bringing the § 362(h) motion. Failure to produce evidence of actual damages precludes award of monetary damages, costs or attorney fees.

V. THE ESTATE, 2491-2760

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In re McGregor Harbor, Inc. — § 550(a)(1)
Bky. L-92-00234D, Adv. 92-2239LD — Fed. R. Bankr. P. 7056
Chapter 7, 5/28/93

Debtor corporation made a payment to a Bank on a real estate contract which was guaranteed by insiders. The payment was made within 1 year but more than 90 days before filing bankruptcy. The issue is whether the payment is avoidable under the one-year reach-back period because it benefits the insider-guarantors. Trustee requests summary judgment. The Bank argues that it is an outside creditor subject only to the 90-day reach-back period. HELD: Rule 7056 governs summary judgment. Deprizio held that the preference-recovery period is one year where the payment produces a benefit for an insider-guarantor. The Court concludes that Deprizio should be followed. Noninsider-creditors with insider guarantees are vulnerable to the extended reach-back period. Assuming the payment constitutes a preferential transfer, it may be recovered from the Bank.

Currell v. McCool & McCool — 11 U.S.C. § 547(b)
In re Charles Joseph Matheny — § 547(c)(2)
Bky. L-92-00520-C, Adv. 93-1059LC
Chapter 7, 8/10/93

In complaint to recover preference, trustee seeks to recover $700 paid on date of filing bankruptcy petition for legal services rendered in Debtor's dissolution proceedings. Law firm claims the payment is not recoverable because 1) it was made in the ordinary course of business or 2) it was paid out of exemptible tax return funds. HELD: Attorneys are in no better position than any other prepetition creditor who receives a preference. The "ordinary course of business" exception does not apply because the payment was not part of normal credit transactions between Debtor and the law firm. The fact that the transfer involved exemptible property does not protect it from the trustee's avoidance powers. Debtor's right to claim an exemption may not be asserted by a creditor.

VI. EXEMPTIONS, 2761-2820

In re Gordon and Mary Jo Kunkle — 11 U.S.C. § 541(c)(2)
Bky. 93-60077LW — Iowa Code § 627.6(5)

Chapter 7, 6/4/93 § 627.6(8)(e)

Creditor objected to Debtors' exemptions of household goods and a 401K plan. HELD: 1) Items used for home and lawn maintenance are exempt. Items relating to use and maintenance of vehicles are not exempt as household goods. 2) Sec. 627.6(8)(e) appears to exempt only distributions from a pension plan, although it has been applied to exempt the corpus of pension plans. Regardless, § 541(c)(2) excepts spendthrift trusts from inclusion in the Debtors' bankruptcy estate. Patterson recently held that this includes ERISA-qualified plans. Thus, the 401K plan, which is an ERISA-qualified plan, is not property of the estate. The objection to exemption as to the 401K plan is moot.

In re Paul and Teresa Bishop — 11 U.S.C. § 522(b)
Bky. 93-60176LW — Iowa Code § 627.6(11)
Chapter 7, 6/29/93 — 11 U.S.C. § 522(f)(2)(B)

ISSUE 1. The court considered whether Debtors "engaged in farming" for purposes of § 522(b) and Iowa Code § 627.6(11). HELD: Debtors are considered to be "engaged in farming" under § 627.6(11)(a). Both debtors had strong farm backgrounds, they operated a dairy operation until they filed bankruptcy, they were employed as laborers on another farm at the time of filing bankruptcy, they expressed intentions to engage in custom farming, and they desired to eventually acquire their own grain or livestock operation. ISSUE 2. The second issue is whether any of the notes made between the Debtors and the Bank retained their purchase money security interest (PMSI) status. Debtors had made some payments on the notes. The parties had also effected a consolidation which could be considered a novation. Very little evidence was offered by either party in this regard. HELD: Debtors bear the burden of establishing every element of § 522(f) including whether or not a PMSI exits. As a consequence of the vague testimony and complete lack of documentation offered, Debtors did not meet their burden of proof. They were specifically unable to establish a novation because there was no proof of the parties' intent to extinguish the original debt.

In re Louis E. Guynn — 11 U.S.C. § 522(b)(2)
Bky. L-91-1545C — Iowa Code § 627.6(10)
Chapter 7, 8/17/93 — § 561.1
Fed. R. Bankr. P. 1009(a)

The trustee and a creditor object to Debtor's claim of a homestead exemption for a remainder interest in real estate. Creditor also objects to exemption claim for tools of the trade, asserting that Debtor is bound by exemption claims made in Chapter 12 prior to conversion to Chapter 7. HELD: 1) Remainder interest cannot constitute homestead exemption because it is a future interest and nonpossessory. Debtor may claim exemption to extent of his leasehold interest. 2) Court will consider prejudice to creditors or bad faith of Debtor in deciding motion to amend exemptions. Court previously approved lien avoidance as to property originally claimed exempt. If exemptions are changed, Debtor would profit by lien avoidance on property now claimed exempt. Also, new exemptions would circumvent original settlement between Creditor and Debtor. Motion to amend exemption schedules denied because amendment would prejudice creditors.

VII. CLAIMS, 2821-3000

C. ADMINISTRATIVE CLAIMS, 2871-2890

In re ASAP Printing, Inc. — 11 U.S.C. § 365(d)(3); § 503(b)(1)(A)
Bky. 93-60443LW
Chapter 7, 7/26/93

Creditors/lessors seek payment of rent as an administrative expense for Debtor's use of leased premises between filing bankruptcy and the trustee's abandonment of the lease. Trustee argues that, because Debtor's use of the property was not necessary and did not benefit the estate, Creditors' claim for rent does not qualify as an administrative expense. HELD: A majority of courts have concluded that § 503 provides for payment of rent using an objective approach for valuing the use of the property. Even though Debtor's use was of limited value to the estate, Creditors are entitled to compensation under § 503(b)(1)(A). Sec. 365(d)(3) requires the trustee to make lease payments post-petition. The Court concludes that the § 503(a)(1) requirement that debtor's use be necessary or of benefit to the estate does not apply to lease payments under § 365(d)(3). Creditors are granted administrative expense claim for rent.

VIII. TRUSTEES, 3001-3020

IX. ADMINISTRATION, 3021-3250

A. IN GENERAL, 3021-3060

In re Bockes Brothers Farms, Inc. (Incurring Secured Debt) and individual Bockes debtors — 11 U.S.C. § 364(c)
Bky. 93-60881KW, et al
Chapter 11, 5/26/93

Debtors seek to obtain post-petition financing by granting the proposed creditor, Ag Services, a lien on the 1993 crops. The various debtors propose to cross-guarantee the financing granted to each of the other debtors. A secured creditor, Farmland, objects to the financing arrangement. HELD: Cross-collateralization by securing pre-petition debt with pre-petition and post-petition collateral has been criticized. This case is distinguishable as the "cross-collateralization" consists of cross-guarantees between the various Debtors. Regardless, this situation satisfies the four-part test in Texlon. The request for this interlocking type of security arrangement is approved. Proposed interim order approved with some exceptions.

B. POSSESSION, USE, SALE, OR LEASE OF ASSETS, 3061-3100

In re Bockes Brothers Farms, Inc. (Cash Collateral) and individual Bockes debtors
Bky. 93-60881KW, et al
Chapter 11, 6/10/93

11 U.S.C. § 362(d)
§ 363(b)(1)
§ 364(c)
Fed. R. Bankr. P. 4001(c)

Various motions pending. Court lifts automatic stay to allow creditor to file continuation statements to preserve UCC liens more than five years old. Final hearing on interim financing should not be held without notice required in Rule 4001(c). Stipulation regarding interim financing approved.

Motion to Prohibit Use of Collateral - No cash collateral is now being converted by Debtors. Fuel and feed being used for 1993 crop was all purchased post-petition and thus does not constitute collateral of creditor Farmland. Use of farm machinery, buildings and real estate has been in the ordinary course of business under sec. 363(b)(1). No unusual depreciation of these assets is occurring; use of the assets is not significantly decreasing their value. Court concludes that Farmland has a limited equity cushion and use of collateral is not significantly impairing its value. Adequate protection includes regular and periodic maintenance of machinery and equipment, maintenance of insurance, appraisal now and upon harvest. Farmland is granted second lien in 1993 crop to extent the value of collateral is decreased by Debtors' use.

X. DISCHARGE, 3251-3440

A. IN GENERAL, 3251-3270

Ewing v. Ewing
In re Larry Carson Ewing
Bky. 92-11343LC - Adv. 92-1231LC
Chapter 7, 5/21/93

11 U.S.C. § 523(a)(5)

On motion for summary judgment, the issue is whether a distribution provided for in a dissolution decree constitutes support under § 523(a)(5), making it nondischargeable. HELD: The intent of the parties and the judge who granted the dissolution controls the issue. The issue of intent is in controversy, precluding summary judgment.

B. DISCHARGEABLE DEBTORS, 3271-3340

Agristor Leasing v. Dinsdale
In re Thomas Dinsdale
Bky. L-92-00669C, Adv. 92-1131LC
Chapter 7, 8/19/93

11 U.S.C. § 727(a)(2)(A)
§ 101(58)
Iowa Code § 633.704

Creditor's complaint objects to discharge under § 727(a)(2)(A) based on Debtor's transfer or concealment of property with intent to defraud. Within one year before filing bankruptcy, Debtor disclaimed an inheritance from his mother's estate and changed the name on a Coop account in which dividends were

deposited. Third allegation by Creditor was not supported by the evidence. HELD: Creditor must prove elements of sec. 727(a)(2) claim by preponderance of the evidence. Proof of harm to creditor is not required. Fraudulent intent may be inferred from "badges of fraud". Disclaimer of inheritance constitutes a transfer of Debtor's property, even though Probate Code calls for relation back of disclaimer to date of decedent's death. Changing the name on Debtor's Coop account constitutes both a transfer and a concealment of Debtor's property. Many of the "badges of fraud" are present in these circumstances. The transfers benefitted family members but Debtor retained beneficial use of the property. Debtor had the specific intent to maneuver these assets to keep them away from creditors. Denial of discharge is appropriate.

C. DEBTS AND LIABILITIES DISCHARGED, 3341-3410

Mercantile Bank v. Wong — 11 U.S.C. § 523(a)(2)(A)
In re Michael and Melanie Wong — Fed. R. Bankr. P. 7056
Bky. 92-22051LD, Adv. 93-2025LD
Chapter 7, 8/9/93

Debtor moves for summary judgment on Bank's complaint to determine dischargeability of Debtors' Mastercard debt. Bank asserts Debtors obtained credit through false pretenses or misrepresentations. HELD: Sec. 523(a)(2)(A) invokes common law elements of fraud, requiring evidence of intent. Factual dispute regarding Debtors' intent to deceive precludes summary judgment.

Williams v. Raymon — 11 U.S.C. § 523(a)(6)
In re Richard D. Raymon — Collateral Estoppel
Bky. 92-11849LC, Adv. 93-1004LC
Chapter 7, 8/11/93

Plaintiff moves for summary judgment in his complaint to bar discharge of debt. He obtained a judgment in state court for both actual and punitive damages based on Debtor's willful and malicious conduct in ramming his car into Plaintiff's car. Plaintiff argues that the doctrine of collateral estoppel entitles him to summary judgment. HELD: The small claims court found that Debtor's conduct was intentional, willful and wanton. Willfulness and maliciousness are two elements of § 523(a)(6). The four criteria of collateral estoppel are met. Debtor had a full opportunity to litigate the issues in small claims court. Plaintiff is entitled to summary judgment and a determination that the debt, including both actual and punitive damages, is nondischargeable.

XI. LIQUIDATION, DISTRIBUTION, AND CLOSING, 3441-3460

XII. BROKER LIQUIDATION, 3461-3480

XIII. ADJUSTMENT OF DEBTS OF A MUNICIPALITY, 3481-3500

XIV. REORGANIZATION, 3501-3660

B. THE PLAN, 3531-3590

In re Leon F. Funke — 11 U.S.C. § 1141(a)
Bky. L-89-00327-D — Iowa Code § 654.18
Chapter 7, 7/12/93

Creditor seeks to enforce a Stipulation regarding a real estate mortgage which was incorporated into the Plan of Reorganization. Debtors had defaulted under the Stipulation. The Stipulation provides for use of the nonjudicial foreclosure procedures set out in Iowa Code § 654.18 upon default of Debtors. Debtors refuse to execute documents necessary for Creditor to effect nonjudicial foreclosure. They claim a right to cancel under § 654.18 and a right to mediation under Chapter 654A. HELD: The confirmed plan is a binding contract over which the Court retains post-confirmation jurisdiction. Creditor argues that, under the Supremacy Clause, the Plan provisions prevail over the state statute which gives a right to cancellation. The Court finds that the Stipulation and sec. 654.18 are not in conflict. The intent of the Stipulation is to adopt sec. 654.18 procedures. Failure to provide notice of the right to cancel at the time the Stipulation was executed is insufficient reason to undo the agreement of the parties. Mediation under Chapter 654A is not appropriate as the parties have in effect reached a voluntary mediation through their Stipulation. Debtors are ordered to execute documents to allow Creditor to proceed with nonjudicial foreclosure.

XV. ARRANGEMENTS, 3661.100-3661.999

XVI. COMPOSITIONS, 3662.100-3670

XVII. ADJUSTMENT OF DEBTS OF FAMILY FARMER, 3671-3700

XVIII. INDIVIDUAL DEBT ADJUSTMENT, 3701-3740

In re Robert and Helen Akers — 11 U.S.C. § 727(a)
Bky. L92-00626C — § 103(b)
Chapter 13, 6/30/93

Creditor requested denial of discharge under § 727. Debtors subsequently converted from Chapter 7 to Chapter 13. HELD: Upon conversion, a § 727 denial of discharge is no longer an available remedy.

Section § 103(b) specifically indicates that Subchapter II of Chapter 7 applies only to Chapter 7 cases. Since § 727 is found in Subchapter II, it is limited to Chapter 7 and has no applicability to Chapter 13 cases.

XIX. REVIEW, 3741-3860

XX. OFFENSES, 3861-3863